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In the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners' Reply Brief

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Petitioners' Reply Brief

INTRODUCTION

In opposing the Petition for Certiorari, Texas asserted that the "Federal Interpleader Act . . . supersedes the very general exclusivity provision of section 1251(a)(1) [sic] and creates district court jurisdiction over this action in the nature of interpleader." Tex. Br. in Opp. 13-14. We dealt with that suggestion at length in our opening brief, which showed that Congress did not intend to create any such exception to the Court's exclusive jurisdiction over controversies between states. *See* Pet. Br. 19-25. Appropriately, neither of Respondents' briefs on the merits pursues that line of argument, and we presume that it has been abandoned. Instead, two other arguments have been advanced, which we shall discuss in turn.

The Estate argues that this action is not a controversy between states and thus that interpleader jurisdiction is not barred by 28 U.S.C. § 1251(a). As we shall show in Part I(A), *infra*, that argument ignores the reality of this case—in which California and Texas are adversaries in every sense of the word. The remarks of Justice Stewart on which the Estate relies were addressed to very different circumstances.

Texas argues that if the Court rejects its contention that the Eleventh Amendment bars this suit, it follows that a statutory interpleader suit would not infringe the exclusive jurisdiction given this Court over controversies between states because "it will have already been determined that this is not a suit against either the State of California or the State of Texas." Tex. Br. 13. As we will show, the Eleventh Amendment inquiry is quite distinct from the question of whether the interpleader action is barred by Section 1251(a). *See* Part I(B), *infra*. The logical threshold question is whether Congress has authorized an action such as this one to be brought in a federal district court. If it has not, then the Court need not and should not decide whether Congress *could* craft a statute for the precise purpose of providing for

district court resolution of multi-state domicile disputes.[1] Thus, in this circumstance in particular, the Court should reject Texas' suggestion that it decide a difficult constitutional question *before* considering a relatively straightforward statutory one. *See, e.g., Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979) (court below erred in reaching constitutional issue before reaching dispositive statutory issue); *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1949); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Accordingly, both logic and sound prudential considerations compel consideration of the statutory jurisdictional issue before the Court decides

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1. As suggested in California's companion Motion for Leave to File Complaint in *California v. Texas*, No. 88, Orig., at pp. 37-38 n.18, Congress could create an express exception to the exclusivity of the Court's original jurisdiction which would provide a fair and workable procedure for the resolution of such controversies. Among other things, the peculiar jurisdictional problems discussed in our opening brief (*see* pp. 27-31) and the problem of venue—which under the venue provisions of the Interpleader Act would ordinarily result in the trial being held before a jury in one or the other of the claimant states (*see id.* at 10-17)—could be avoided.

The Eleventh Amendment problem might also be avoided if Congress enacted such a statute. If the statute provided for an action to be brought by one state against another, neither sovereign immunity nor the Eleventh Amendment would be a bar, for suits between states are "inherent in the constitutional plan." *Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934). While that observation was made of such suits brought in this Court, presumably it would be no less true if Congress exercised its power to create concurrent jurisdiction in the district court. Likewise, if a statute expressly authorized suit in the nature of interpleader to be brought against states by an estate representative, authority might be found in Section 5 of the Fourteenth Amendment. Were Congress to find, for example, that the due process rights of both the estate and the rival claimant states were jeopardized by the present lack of a suitable, certain forum with jurisdiction over all interested parties, Congress may well be able to override any immunity from suit otherwise afforded by the Eleventh Amendment. *See Hutto v. Finney*, 437 U.S. 678, 693-99 (1978) (attorneys' fee award authorized by federal statute and imposed against state treasury); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

Because the Eleventh Amendment issue would be cast in an entirely different light by a carefully drawn statute, the Court should be especially hesitant to reach the Eleventh Amendment issue presented in this case unless and until it has satisfied itself that Congress intended to authorize this kind of suit to be brought in a federal district court.

whether the Eleventh Amendment bars this action. We thus discuss the statutory issue raised by Texas' new position in Part I(B) before turning to the constitutional issue in Part II.

I.

THE DISTRICT COURT LACKS JURISDICTION BECAUSE THIS IS A "CONTROVERS[Y] BETWEEN TWO ... STATES" (28 U.S.C. § 1251(a)).

A. This Is a Controversy Between Two States.

The Estate defends the District Court's jurisdiction by asserting that the denial in 1978 of California's motion for leave to file necessarily established that the present statutory interpleader suit "is not yet a dispute between two states." Est. Br. 10. Citing Justice Stewart's concurring opinion, the Estate urges that this is a controversy between the Estate and each claimant state, and not a controversy between the states themselves. *Id.* at 11.

We do not know the grounds on which the Court denied leave to file the complaint in the prior action, as no opinion was written for the Court. Texas advanced many grounds of opposition which had nothing to do with the present issue of whether there was (let alone presently is) a controversy between California and Texas.[2] Justice Stewart's concurring opinion did argue that, *as matters then stood*, the real controversy was between each taxing state and the Estate, and not between California and Texas themselves. *See California v. Texas*, 437 U.S. 601, 611-12 (1978). Whether that analysis was or was not correct is entirely irrelevant here.[3] For so long as California and Texas can involuntarily be joined as defendants in a statutory interpleader suit, they are *ipso facto* compelled to participate in a controversy between

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2. *E.g.*, Texas then urged that the conditional settlement agreement between California and the Estate (which, of course, is now no longer in effect) made the action collusive. *See* Tex. Brief in Opposition to Motion for Leave to File in *California v. Texas*, No. 76, Orig., at 8-11.

3. We discuss that analysis, and endeavor to persuade this Court of its errors of law and logic, in our companion Motion for Leave to File at pp. 28-39. For present purposes, however, we need only show that, whatever may be said of the situation which existed in 1978, or even of the present Motion for Leave to File, this statutory interpleader suit is the paradigm of a controversy between two states within the meaning of Section 1251(a). That is the burden of the discussion in the text above.

two states which under Section 1251(a) cannot be heard in a district court.

Justice Stewart's opinion described a situation which no longer exists. In 1978, there were separate tax proceedings pending in the California and Texas state courts. Neither state being a party to the proceedings in the other's state court, each was free to determine domicile, and impose death taxes, without concern for the acts of the other state. Thus Justice Stewart concluded that "it would be of no possible concern to either California or Texas that the other might adjudge Hughes a domiciliary and succeed in taxing his estate . . . ." 437 U.S. at 611.

That statement cannot possibly be made of the present circumstances. The Estate has filed a federal interpleader suit, joining as rival claimants both California and Texas. The independent state tax proceedings in the California and Texas state courts have been enjoined. The very predicate of this interpleader suit is that the respective state claims are mutually inconsistent (*see* Pet. Br. 17-18 and notes 22-23) and that no more than one state can prevail. Its purpose is to make the competing states—which previously were free to proceed without regard for the acts of the other state—litigation adversaries.

The error of the Estate's contention that this suit involves only a dispute between the Estate and each of the two claimant states can most easily be seen by considering the following hypothetical: suppose that States A and B each claims domicile, and each seeks to impose an 18% tax. The estate concedes that one or the other state was the true domicile, and interpleads the 18% tax. In this situation, in which the stakeholder is not "interested" because it makes no claims to the "fund", could there be any doubt that the *only* remaining controversy is between the claimant states? Indeed, in such circumstances, it is customary for the stakeholder to play no further role in the interpleader suit and to be dismissed. *See General Atomic Co. v. Duke Power Co.*, 553 F.2d 53, 56 (10th Cir. 1977); 3A MOORE'S FEDERAL PRACTICE (hereafter "MOORE") ¶ 27.14(1), at p. 22-124. This is done "so that the true dispute will be settled between the true disputants, the claimants." *Id.* ¶ 22.02[1] at pp. 22-4 to 22-5.

That example differs from this case because the Hughes Estate *is* "interested," and disputes the claims of both California and Texas. But the addition of a dispute between the Estate and the two states does not eliminate the controversy which exists between the two claimant states. That controversy which engulfs the state litigants remains squarely within Section 1251(a), for the exclusive original jurisdiction of this Court is not altered by the presence of state parties[4] *See, e.g., New Jersey v. New York*, 345 U.S. 369, 374-75 (1953) (city joined as additional party); *New York v. New Jersey*, 256 U.S. 296 (1921) (local sewage agency); *Texas v. Florida*, 306 U.S. 398 (1939). The last case is, of course, exactly on point. There, a multi-state domicile dispute between Texas, Florida, Massachusetts and New York was treated by the Court under its original jurisdiction even though the decedent's heirs at law were also joined as additional parties.

The indisputable reality is that if this interpleader action is allowed to proceed, California and Texas will be involuntary adversaries before the District Court. That conforms to the general understanding of, and practice in, the so-called "second stage" of interpleader. "At this juncture, *each claimant occupies an adversary position to the others* and must proceed accordingly." 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (hereafter "WRIGHT" § 1714 at 441-42 (emphasis added). "Each [interpleader claimant] must state his claim and answer that of the

4. This case does not present the question of whether a federal district court, having before it a case involving a state and other non-state parties, could allow the joinder of another state where the dispute between the two states is ancillary to the primary controversy. *See State Water Control Board v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974) (in suit between Virginia and a local commission, state of Maryland not permitted to intervene in opposition to Virginia because of exclusive jurisdiction provision of § 1251(a); theory of "ancillary jurisdiction" rejected). In such a case, it could be argued that Section 1251(a) does not preclude the exercise of such ancillary jurisdiction. Even if it did, Section 1251(a) would not preclude resolution of the primary dispute between the state and the non-state parties. In this case, by contrast, the controversy between the two states is not ancillary to, and cannot be severed from, the disputes between the Estate and each state. To the contrary, the controversy between California and Texas is at the heart of the interpleader action, and joinder of the two states was required not only by the statutory requirements of the Interpleader Act but also because, under Rule 19, the states are indispensable parties.

other so that the issue between them is joined." *Phoenix Mutual Life Insurance Co. v. Reich*, 75 F. Supp. 886, 889 (W.D. Pa. 1948); 3A MOORE ¶ 22.14[1] at p. 22-125 and n.1 and cases cited. Appropriately, then, the Estate—even as it denies the applicability of Section 1251(a)—acknowledges that "the tax officials' claims are certainly adverse to each other . . . ." Est. Br. 10.

For these reasons, it simply cannot be said that no controversy exists between California and Texas in the statutory interpleader suit the Estate has brought.

B. Section 1251(a) Is Not Avoided by the Device of Naming State Officers as Defendants Where the States Are Real Parties in Interest.

Texas offers a different argument: this case, it suggests, is not a controversy between states at all, but only a dispute between Kenneth Cory and Messrs. White and Bullock, the named state taxing officials. The suggestion would be ludicrous were we not so accustomed to the fiction of *Ex parte Young*, 209 U.S. 123 (1908). Texas urges that this fiction be extended to analysis under Section 1251(a)—that is, the official capacity in which the state tax officials have been sued (*see* A.1, 2-3) should be ignored. Tex. Br. 12-13.

Texas' argument is without merit, for two distinct reasons. The first is that whether an action is deemed to be against a state for purposes of the Eleventh Amendment involves issues and considerations entirely distinct from the question of whether it is a controversy between two states within the meaning of Section 1251(a). Eleventh Amendment analysis utilizes a fiction which cannot woodenly be transported to the analysis of other legal questions. Section B(1), *infra*. Moreover, even if the *Young* fiction were used for purposes of Section 1251(a) analysis, it would not apply here because the state taxing officials have not acted unconstitutionally in asserting their respective tax claims. Section B(2), *infra*.

1. THE FICTION OF EX PARTE YOUNG IS IRRELEVANT TO THE ISSUE OF EXCLUSIVE JURISDICTION UNDER SECTION 1251(a).

That *Ex parte Young* employed a fiction has been universally conceded. *See, e.g.*, 17 WRIGHT, *supra*, § 4231 at p. 359; 12 MOORE, *supra* ¶ 300.03[4.-1], at pp. 1-70 to 1-71; TRIBE,

AMERICAN CONSTITUTIONAL LAW 144, 146 (1978). The consequence was to make state governments subject to judicial enforcement of the Constitution. Thus the *Young* fiction was, as Professor Tribe has written, born of "evident necessity." *See id.* at 146. As such, it is an honorable fiction.[5] Texas urges that the same fiction should be extended to Section 1251(a) to transmogrify a strenuous controversy between the fiscal interests of California and Texas into something other than a "controvers[y] between two . . . states." Use of the *Young* fiction for that purpose is not supported by history or the "evident necessity" which propelled the Court in *Ex parte Young*. That history and necessity has been and should be the measure of the fiction's scope.[6]

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5. It is also an ancient one. Professor Moore traces the roots of *Ex parte Young* to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and before that to English common law principles of sovereign immunity. 12 MOORE, *supra*, at pp. 1-70 to 1-71.

6. The *Young* fiction has not been extended to other circumstances. For example, shortly after *Young* was decided, the Court rejected the contention that a municipal ordinance challenged as violative of the Fourteenth Amendment must be sustained because the ordinance was contrary to *state* law and, hence, could not involve "state action." *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 288-89 (1913). Thus, although a suit challenging under the Fourteenth Amendment acts performed under a state law is brought against a state officer only upon the fiction that his allegedly illegal conduct is *ultra vires* (and thus the suit is not "against" the State for purposes of the Eleventh Amendment), that same *ultra vires* quality will not result in the conduct being stripped of its "state action" character for purposes of the Fourteenth Amendment. *Accord, Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974).

Likewise, under the original three-judge court statute, a court of three judges was required only where the injunction was sought against "any officer of such state." 36 Stat. 557 (1910), codified as Section 266 of the 1911 Judicial Code. The requirement did not apply where the defendant was a local official. *Ex parte Public National Bank*, 278 U.S. 101 (1928); *Wilentz v. Sovereign Camp., W.O.W.*, 306 U.S. 573 (1939). In many cases, the requirement of three judges was applied where it was alleged that the acts of the state officer were unconstitutional. *E.g., Stratton v. St. Louis Southwestern Railway*, 282 U.S. 10 (1930). Such suits were possible, of course, only through the fiction of *Ex parte Young*. Nevertheless, it was never suggested that a court of three judges was not required because the defendant was not sued as an "officer" of the state in light of the allegation of unconstitutional, and thus *ultra vires*, conduct.

The same fiction might have, but has never, been extended to the issue of immunity. For example, a judge whose acts resulting in the sterilization of a retarded person were unauthorized by statute or common law, and were contrary to due process requirements, is not by the *Young* fiction stripped of his official position in the eyes of the law and deprived of immunity. *See Stump v. Sparkman*, 435 U.S. 349 (1978).

But here, disregard of the realities of the situation in favor of a fiction would frustrate the clearly expressed will of Congress that lawsuits between two or more states be heard, if at all, in this Court.

It is no overstatement to say that if Texas' view were to prevail, Congress' stipulation that the Court's jurisdiction over controversies between two or more states be *exclusive* would be a dead letter. By the simple expedient of naming as the defendants one or more state officers rather than the state itself, any state having a dispute with another state in which prospective relief was sought could, at its election, bring suit in state or federal district court, perhaps in a court sitting in the plaintiff state.[7] The fiction in *Ex parte Young* served the essential purpose of providing a means by which federal constitutional rights could be secured in federal court. No comparable compelling purpose exists here.[8] Application of that fiction to Section 1251(a) would mean the unjustified evisceration of a clearly expressed Congressional requirement that no court save this one adjudicate disputes between sovereign states.[9]

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7. *See Nevada v. Hall*, 440 U.S. 410 (1979) (Nevada subject to suit in the courts of California); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) (Idaho officials sued under long-arm jurisdiction in federal court sitting in Texas).

8. This domicile dispute occurred roughly 40 years after *Texas v. Florida*, 306, 398 (1939). It is unlikely that there will be another even forty years from now. For, in addition to the development of arbitration procedures for the resolution of such controversies (*see California v. Texas, supra*, 437 U.S. at 615 n. 15 (Stewart, J., concurring))—which California, but unfortunately not Texas, has adopted—recent changes in the federal tax laws make it exceedingly unlikely that claims exceeding the total assets of an estate will ever again be asserted. *See* Tex. Br. 20-21 (referring to the reduction of the maximum rate from 77% to 70%); Economic Recovery Act of 1981 § 402, Pub. L. 97-34 (reducing maximum rate from 70% to 50% over four-year period).

9. With little imagination, virtually any suit between states previously regarded as solely within the exclusive jurisdiction of this Court could be heard in a trial court at the plaintiff's option. Moreover, many such controversies, such as the one presented in *Maryland v. Louisiana*, ... U.S. ....., 49 U.S.L.W. 4383 (1981), could be structured as a statutory interpleader suit; in the circumstances of that case, for example, a pipeline company might have attempted to interplead Louisiana (the taxing state) and Maryland (a consumer state which reimbursed the pipeline company for the challenged tax). As a result, controversies which in fact pit state against state could be instituted by a private litigant at a time and in a venue selected by that private litigant.

The history of Section 1251(a) is unambiguous. Gradually, Congress has made most categories within the Court's original jurisdiction subject to the concurrent jurisdiction of other courts. *See* 28 U.S.C. § 1251(b). But it has insisted that the Court's jurisdiction over controversies between states remain exclusive. *See* Pet. Br. 22-23. Indeed, only once has Congress crafted an exception to that exclusive jurisdiction—and then only by a statute which conditions district court jurisdiction on the defendant state's *consent*. *See* Pet. Br. 23 n.31. If states are to be stripped of their right to have suits brought against them by other states heard in this Court, and not in the federal district or state court of plaintiff's choice, Congress must do it. A fiction born of genuine necessity, and in another era, may not woodenly be imported into Section 1251(a) to achieve that end.

2. THE DEFENDANT OFFICIALS HAVE NOT ACTED UNCONSTITUTIONALLY.

Even if the *Young* fiction did apply to analysis under Section 1251(a), the state taxing officials have not engaged in unconstitutional or illegal conduct such as would separate them from their respective state employers. That fiction is premised upon unconstitutional or illegal conduct on the part of the state officer; in such circumstances, it is said, the nexus to the state is absent and the Eleventh Amendment does not prohibit suit (at least for prospective relief) against the officer.

But no such illegal or unconstitutional conduct is present here. The Estate's conclusory assertions to the contrary are totally foreclosed by consistent precedent, both long-standing and recent. Here, two states have asserted inconsistent claims of domicile with respect to a decedent whose life made that question an uncertain one. More than forty years ago, the Court rejected a contention that the assertion of such claims violates the Constitution. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). Whatever may be said of *Worcester County's* Eleventh Amendment analysis,[10] its rejection of the constitutional claim has never been questioned:

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10. We recognize, of course, that the Court of Appeals accepted the Estate's argument that the Eleventh Amendment does not bar this action, and that *Worcester County* had been overruled by *Edelman v. Jordan*,

"Petitioner's [the executor's] contention is that here the prospective official action of respondents involves a threatened violation of the Constitution for which state law can afford no sanction. It is said that as the officers of each state assert the right to collect the tax out of decedent's property within the state, they may succeed in establishing that right by a judicial determination in each that decedent was last domiciled there, . . . and petitioner is thus exposed to the danger of double taxation, which the Constitution forbids.

* * * *

"But this argument confuses the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall, with other types of action by state officers, which, because it passes beyond the limits of a lawful authority, is within the reach of the Federal judicial power notwithstanding the Eleventh Amendment. . . .

* * * *

". . . [T]*he Constitution of the United States does not guarantee that the decisions of state courts shall be free from error*, . . . or require that pronouncements shall be consistent. . . . Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries. . . . *Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States.*" (*Id.* at 297-99) (citations omitted, emphasis added))."

The Estate seeks to distinguish the *Worcester County* case. *Worcester County*, it says, was a dispute which involved two

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supra. But it is important to understand that the ground on which Justice Stewart urged, and the Court of Appeals held, the Eleventh Amendment to be inapplicable is quite distinct from the issue we are now discussing. Neither Justice Stewart nor the Court of Appeals suggested that the state tax officials were acting unconstitutionally or illegally. (Indeed, Justice Stewart concluded that they were not. *See* 437 U.S. at 612). Rather, the Court of Appeals held that *Edelman* created a *second* exception to the Eleventh Amendment: even though the state officer is not acting illegally so that his nexus to the state may be disregarded, where "only prospective, equitable relief [is sought] the eleventh amendment does not preclude [the] suit." *Lummis v. White*, 629 F.2d 397, 402 (5th Cir. 1980); Pet. App. 8a.

states, one of which was *conceded* to be the domicile; here, by contrast, the Estate denies the domicile claims of *both* California and Texas. The asserted significance of this fact is that in *Worcester County*, but not in the present case, at least one of the states was acting lawfully; here, neither state's claim is valid. Est. Br. 24-26.

With all respect, this supposed ground of distinction is utterly specious. In the first place, the *Worcester County* opinion permits no such distinction; the whole point of the Court's analysis was that the assertion of factually erroneous claims by state taxing officials does not violate the Constitution. Moreover, the logic of the Estate's revisionist analysis of *Worcester County* does not survive scrutiny. By the Estate's account, the complaint in *Worcester County* at least alleged that one of the two states was not the state of domicile; yet the opinion holds that no tenable federal claim was asserted against *either* of the two states.

The rejection of this constitutional claim in *Worcester County* states a bedrock principle of our federal system. Federal questions are not stated merely by alleging that a state court has decided a question of state law incorrectly, let alone that an unadjudicated *claim* made in a state court by a governmental litigant is factually erroneous.[11] "Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 555 (1962). Like the taxing officials in *Worcester County*, the Texas and California taxing officials "propose to do [no] more than invoke the action of [their] courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in [their jurisdiction] as the basis of [their] power to impose the tax." 302 U.S. at 298-99.

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11. The Court has always held that "an erroneous decision of a state court does not deprive the unsuccessful party of . . . due process of law, within the 14th Amendment of the Constitution of the United States." *Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895). "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions . . . ." *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 166 (1917). *See also Bishop v. Wood*, 426 U.S. 341, 347-50 (1976) ("The Due Process Clause . . . is not a guarantee against incorrect or ill-advised [administrative] decisions"); *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *Texas v. Florida*, 306 U.S. 398, 410-11 (1939); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). *A fortiori*, the mere institution of a case based upon a claim which is ultimately found to be unsound does not violate the Constitution.

The Estate also argues that assertion of the state tax claims violated the Estate's due process rights under *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961) because neither state can, in its own courts, protect the Estate from the conflicting claim of the other state. Est. Br. 18-20. That contention is also foreclosed by *Worcester County* and *California v. Texas, supra*.

In *Worcester County*, as in this case, the estate alleged that it was "exposed to the danger of double taxation, which the Constitution forbids." 302 U.S. at 297. The Court unambiguously rejected this claim. This aspect of its holding has never been questioned. Indeed, it was reaffirmed in the concurring opinion of Justice Stewart in *California v. Texas, supra*, which emphatically states: "[T]here is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes Estate by proceedings in their own courts." 437 U.S. at 612 n.13 (Stewart, J., concurring). Moreover, Justice Stewart wrote, "the dilemma of multiple taxation arises only because the Constitution *permits both States to impose the tax*." *Id.* at 612 (emphasis added).

Western Union dealt with the escheat of tangible property and held that a state denies due process "if [the holder] is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *Id.* at 75. Instead, states with such claims are compelled to institute an original proceeding in this Court, where rival claimant states can be joined. *Id.* at 79-80. Neither *Western Union* nor any other case holds that a state may not seek to levy a death tax on an estate—a claim not aimed at confiscating specific property but merely one seeking payment of money—merely because another state may do likewise. No case has ever extended *Western Union* to circumstances other than escheat.

The Estate's *Western Union* argument is not without irony. It will be recalled that when California attempted to invoke the Court's original jurisdiction in *California v. Texas, supra*, it called attention to *Western Union*, pointing out that *if Western Union* applied to multi-state domicile disputes, then California was obliged to seek a unitary adjudication of domicile in this Court, and the Court was *obliged* to exercise its original jurisdiction and resolve the controversy. *See* California's Reply to Brief in Oppo-

sition to Motion for Leave to File Complaint at 15-16.[12] Surely a state which has unsuccessfully attempted to invoke the Court's original jurisdiction does not violate the Constitution by thereafter proceeding in its own courts on its death tax claim.

The Estate's position would lock the states in an impossible, "Catch-22" situation. Knowledge of a rival state claim would bar a state from proceeding in its own courts to assert a bona fide death tax claim. Yet, so long as *California v. Texas* is the last word on the availability of original jurisdiction, the state could not do as *Western Union* anticipated and initiate suit in this Court against the rival state. Nor could a state seek relief under the Interpleader Act, as only a stakeholder may initiate such suits.[13] With all states barred from asserting a tax, no estate representative or heir would have an incentive to initiate a federal interpleader suit, even if one were available. Surely the Due Process Clause does not bar states from proceeding in their own courts where no alternative forum or procedure is available to them as of right.

Accordingly, the Estate's claims of unconstitutional conduct by the state taxing officials are totally without merit.[14] Even if the *Ex parte Young* fiction were applicable to analysis of whether a controversy is one between states within the meaning of Section 1251(a), the clear absence of unconstitutional or

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12. Justice Stewart's concurring opinion in *California v. Texas* found no merit in the analogy to *Western Union:*

> "In *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, the Court held, by contrast, that a holder of tangible property is denied due process by a state-court judgment of escheat that does not and cannot protect the holder from the escheat claim of another State, and that the proper procedure was for the competing States to invoke the original jurisdiction of this Court. Because the Court held that the States could not constitutionally enforce their escheat laws in their own courts, this Court was the only remaining forum in which a State could escheat property that other States claimed. *The situation in which the present case arises is quite different, since there is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes estate by proceedings in their own courts.*" (437 U.S. at 612 n. 13) (emphasis added).

13. 28 U.S.C. § 1335 permits an interpleader suit to be brought only by a "person, firm, or corporation, association or society having in his or its custody or possession money or property" claimed by "[t]wo or more adverse claimants. . . ." No statutory authority is given *claimants* to initiate interpleader proceedings.

14. The Estate also argues that attempts by Texas and California to collect a domicile-based tax penalize the decedent for exercise of his right to travel. This claim is without merit. Obviously, the possibility of multi-

illegal conduct dooms the Estate's claim that Section 1251(a) does not bar district court jurisdiction over this action.[15]

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ple domicile-based inheritance tax claims did not deter Mr. Hughes from vigorous exercise of his right to travel. Nor would such claims penalize Hughes' exercise of that right. In the first place, California does not seek to tax the Estate because Hughes travelled *out* of California, but because he lived *in* it. Moreover, the overwhelming majority of individuals who engage in interstate travel do so without creating uncertainty as to their domicile. The assertion of multiple claims in this case has not occurred because of where Hughes travelled, but how he lived. In the usual case, a person's domicile may be ascertained, *inter alia*, from his community interests, social life, professional and personal relations, civic ties and the like. But Howard Hughes lived an unusual life and, especially in the later years, possessed none of the usual indicia of domicile. There is no constitutional right to be a multinational recluse. If determining Hughes' legal domicile is difficult in this case, it is due to the peculiar facts of this unusual man's life, and not because the decedent's right to travel is being penalized.

15. If the Court agrees that district court jurisdiction is precluded by Section 1251(a), the issue of whether the Court will permit the invocation of its original jurisdiction would then be presented. That is the subject of California's pending Motion For Leave to File in *California v. Texas*, No. 88, Orig. As we endeavored to point out in our opening brief, the issues are distinct and a determination that Section 1251(a) precludes the instant suit would not necessarily compel the Court to grant the motion. Pet. Br. 25-26.

Because the issues are distinct, the discussion at pp. 18-24 of Texas' brief—in which it is urged that the Court should permit "state courts . . . to resolve these controversies" (*id.* at 18) rather than entertain an original suit in this Court—is inappropriate. We do feel compelled, however, to respond to the suggestion that the Texas probate court has acquired jurisdiction over California and, therefore, could determine domicile in a unitary proceeding binding both California and Texas. Tex. Br. 22-24. That contention is preposterous.

In the first place, at the time of the request for temporary custody of the exhibits, the domicile trial had long been concluded, and California was not named in any pleading as a party to the Texas case. Texas has cited no authority, and we know of none, holding that an act which would constitute an appearance if performed by one who was named as a party in the complaint would also constitute an appearance if performed by a total stranger to the proceedings. Obviously, one who is named in a complaint but who has not been served enters the courtroom at its peril. California was not in that position.

Moreover, the so-called "voluntary appearance" by California was nothing of the kind. The facts are these: In connection with a deposition to perpetuate testimony to be taken in this federal action, California's counsel asked its Texas attorneys to arrange for temporary custody of certain photographs which had been admitted in evidence in the prior Texas domicile trial. Texas counsel, in his own name, obtained an order from the Texas court giving him temporary custody of exhibits. Texas counsel did not purport to "appear" for anybody, and sought no relief from the

II.

THIS ACTION IS BARRED BY THE ELEVENTH AMENDMENT

Responding to the contention (Pet. Br. 36-37) that even though only prospective relief is sought, the Eleventh Amendment nonetheless bars an action where the defendant state officer has not acted unconstitutionally or illegally, the Estate makes two points. First, it asserts that the defendant state officers have in fact acted unconstitutionally. Further, it suggests that after *Edelman v. Jordan*, 415 U.S. 651 (1974), "allegations of unconstitutionality or other illegality may not be necessary in this interpleader action which seeks only prospective relief against state officials." Est. Br. at 17.

We have already dealt with the first of these points. *See* pp. 9-14, *supra*. As we have shown, the good faith assertion of inconsistent domicile claims by the respective state officers was neither unconstitutional nor illegal. Thus the asserted inapplicability of the Eleventh Amendment turns on whether *Edelman* has dispensed with the necessity that the plaintiff establish that the state is not the real party in interest because the defendant state officer, sued in his official capacity, acted unconstitutionally or illegally.[16]

Texas court relating to any issue in the state litigation. As already noted, the Texas state court had long ago completed its trial of the domicile issue; that matter is before the Texas appellate court (and has been stayed in connection with the federal interpleader action).

It is self-evident that a request to inspect or obtain temporary custody of a public record for use in federal litigation cannot possibly constitute a general appearance in the state court. The request of Texas counsel did not constitute a "step in the regular proceeding." 5 AM. JUR. 2d, *Appearance* § 5 at 482 (1975); it bore no "substantial relationship to the cause," nor was it detrimental to any party to the probate court action. 6 C.J.S. *Appearance* § 4 at 7 (1979). By seeking temporary custody of documents for use elsewhere, counsel did not "call[] into being the exercise of [the state court's] judicial function." *Pacific American Gasoline Co. of Texas v. Miller*, 61 S.W. 2d 1024 (Tex. Civ. App. 1933). Indeed, several courts have held that an act such as the one at issue does not constitute a general appearance. *Cox v. Pabst Brewing Company*, 152 Kan. 375, 103 P.2d 871 (1940) (defendant's petition for a copy of plaintiff's complaint not a general appearance); *Vincent v. Penrod Drilling Co.*, 372 So. 2d 807 (La. App. 1979) (answer to interrogatory is not an appearance, despite defendant's failure to expressly challenge jurisdiction); *Investors Diversified Services, Inc. v. Bruner*, 366 S.W.2d 810 (Tex. Civ. App. 1963) (letter to court setting out facts relating to errors in service not general appearance).

16. Contrary to the Estate, California did not waive the Eleventh Amendment defense. To the contrary, the defense was expressly asserted

The Estate does not explain in its brief, nor did the Court of Appeals in its opinion, what in *Edelman* dispensed with the historic requirement that unconstitutional or illegal conduct by the state officer be shown.[17] Nor, with all respect, do the concurring opinions of Justices Stewart and Powell in *California v. Texas, supra*, on which the Estate relies.[18] The *holding* of *Edelman*, of course, provides no comfort; in that case, the state officers had been found to have acted unlawfully. Doubtless for that reason, neither the Estate's brief, the opinion of the Court below, nor the *California v. Texas* concurring opinions quote any portion of the Court's opinion in *Edelman* to support the proposition that the

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in the District Court. *See* A. 76. There California advised the District Court that it would have submitted to the jurisdiction of a federal court sitting in a non-claimant state, but that in the absence of a disinterested forum it "cannot agree that the Eleventh Amendment does not apply in this case." The remarks of counsel quoted by the Estate (Est. Br. 14 n. 8; *see also* Tex. Br. 13-14 n. 4), though ill-stated, were intended to convey the same point as was made to the District Court (and more fully in California's brief in the Court of Appeals): that California favored a unitary adjudication of domicile in a disinterested forum and that if the action were transferred to a disinterested forum, no Eleventh Amendment claim would be asserted by California. Obviously, the circumstance under which California envisioned submission to a district court's jurisdiction—transfer to a disinterested forum—has not yet occurred.

Even if counsel had uniquivocally agreed to waive the Eleventh Amendment, the issue would nonetheless remain for resolution by this Court. In the first place, in the absence of a transfer to a disinterested forum, counsel had no authority from Petitioner Cory to waive the Eleventh Amendment rights of California. California's immunity thus could not be waived by the remarks of counsel. *See, e.g., Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 466-70 (1945); *Linkenhoker v. Weinberger*, 529 F.2d 51, 53-54 (4th Cir. 1975); *Williams v. Eaton*, 443 F.2d 422, 428 (10th Cir. 1971). Moreover, Texas has asserted the Eleventh Amendment in the District Court, the Court of Appeals, and in this Court. Therefore, the issue is before the Court.

17. With respect to this requirement, Professor Moore describes the post-*Edelman* law as follows:

> "To summarize, the Eleventh Amendment does not apply to suits against state officials in which, (1) it is alleged that a state official has acted pursuant to an unconstitutional statute or in a manner not authorized by statue, *and* (2) prospective injunctive relief is being sought." (12 MOORE, *supra*, ¶300.03[4] at p.1-79 (emphasis in original)).

18. As is also the case with the Section 1251(a) issue discussed previously, the *Edelman*/Eleventh Amendment issue was neither briefed nor argued by the parties in *California v. Texas*.

Eleventh Amendment has no application whatever where only prospective relief is sought even though no illegal conduct is involved. And while *Edelman*, and cases subsequent to it cited by the Estate (*see* Est. Br. at 16), have focused on the relief sought, in each instance the underlying cause of action was based on unconstitutional or illegal conduct by the defendant officers.

Admittedly, the distinction between this case and those involving unconstitutional conduct is a narrow one. But it nevertheless is significant. The Eleventh Amendment states in unequivocal terms that suits may not be brought in federal court "against one of the United States"; that prohibition has long been understood to apply even though a state officer, and not the state, is a party of record. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).[19] *Ex parte Young* utilized the *ultra vires* fiction, thereby allowing courts to disregard the interest of the state where unconstitutional acts were charged, so that "the Civil War Amendments to the Constitution [could] serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman v. Jordan, supra*, at 664. That fiction is not available where unconstitutional or illegal conduct is not involved. In this case, there is neither the "evident necessity" (TRIBE, *supra*, at 146) which gave birth to the *Young* fiction nor any other compelling reason which could possibly justify a novel and strained construction of the Amendment.

Until this case, no decision of any court has found the Eleventh Amendment inapplicable to a suit against a state officer where unconstitutional or illegal conduct was not alleged. In this case, no one seriously disputes that the states of California and Texas are the real parties in interest even though only prospective relief is sought; and neither history, precedent or the fiction of *Ex parte Young* can be summoned to make this suit anything less than a suit "against [two] of the United States."

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19. There the Court said:

"It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. [Citations.] Its applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" (*Id.*, quoting from *Ex parte New York*, 256 U.S. 490, 500 (1921)).

III.

THE ELIMINATION OF ONE OF THE TWO "CLAIMANTS" DESTROYS THE JURISDICTIONAL BASIS FOUND BY THE COURT OF APPEALS

As explained in our opening brief, the Court of Appeals was able to find subject matter jurisdiction under 28 U.S.C. § 1335 only by (1) treating the stakeholder as a "claimant"; and (2) finding a second "claimant" who was also a citizen of a state in Petitioner Alvord, the Los Angeles County Treasurer. However, after the Court of Appeals' decision was announced Alvord's nominal interest in the fund was eliminated by a comprehensive revision of California's inheritance tax law. *See* Pet. Br. 32-33. Thus Alvord will make no claim against the Estate, and must be dismissed as a party. Because this leaves only *one* claimant which is also a citizen of a state, the requirement for jurisdiction under Section 1335 is simply not satisfied. *Id.*

Respondents assert that jurisdiction is measured as of the date the complaint is filed. Est. Br. 36-37; Tex. Br. 17. However, we have shown that the courts apply a different rule where subsequent events cause the joinder or dismissal of a party, in which event jurisdiction is re-determined in light of that change in parties. *See* Pet. Br. 33-35. Neither of the Respondents quarrels with our description of the six different categories of cases in which this jurisdictional principle has been applied.[20]

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20. Texas ignores these authorities. The Estate seeks to distinguish them on the ground that they involve only the joinder of indispensable parties or the dismissal of non-indispensable parties and therefore the point at which jurisdiction is measured is "the first time at which the case has been structured as it should have been at the time of commencement." Est. Br. 37 (emphasis omitted). That explanation may apply to some of the cases, but it plainly does not explain all of them. The Estate's characterization does not apply to the *Stanhope, Reynolds* or *Knapp-Monarch* cases described at Pet. Br. 33, ¶1 and n.41; the cases described at *id.* ¶2 and n.42; or the cases described in *id.* ¶6 at 34 and n.46. In these cases, the *permissive* joinder or intervention of non-indispensable parties required the re-determination of jurisdiction.

For a recent example of a post-complaint event which destroyed diversity jurisdiction, *see Desert Empire Bank v. Insurance Company of North America*, 623 F.2d 1371 (1980). In that case, plaintiff obtained leave of court to join an additional and non-diverse party. The Court of Appeals, which viewed that party as a "proper" one but not necessarily one whose presence was required (*see* 623 F.2d at 1374), held that jurisdiction was "destroyed at the moment" of joinder. *Id.*

The Estate suggests that a re-examination of jurisdiction in these circumstances "raises the troublesome problem that . . . state legislatures could exempt officials from suit in federal court by eradicating or otherwise altering the officials' duties after commencement of an action." Est. Br. 36 n.26. Neither Respondent asserts, however, that the revision of California's inheritance tax law had anything whatever to do with the jurisdictional issue pending in this case, and that manifestly is not the case. *See* Pet. Br. 32 n.40. The unlikely possibility that in some other case a state legislature might adopt legislation for the improper purpose of defeating federal interpleader jurisdiction is not a justification for ignoring the California law revision, which bore no relation to this litigation, that has terminated Alvord's claim to a tiny fraction of the fund. The Estate's implication—that a bright-line rule is necessary to protect against an occasional manipulative act affecting jurisdiction—is unwarranted. State legislatures are not known for their ability to move furtively, and the courts are not powerless to correct an abuse if one should occur.[21] Nothing of that nature is involved in the circumstances of this case.[22]

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21. The law is not without remedy against collusive or manipulative acts designed to affect federal jurisdiction. *See* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court"); *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969) (transfer by foreign corporation to citizen of Texas for purpose of creating diversity jurisdiction not permitted to create jurisdiction); *Picquet v. Amoco Production Co.*, 513 F. Supp. 938, 941-943 (M.D. La. 1981) and cases cited at 942 (transfer of interest to corporate plaintiff for purpose of defeating diversity jurisdiction not effective for that purpose); *Gentile v. Lamb-Weston, Inc.*, 302 F. Supp. 161 (D. Maine 1969) (same); 3A MOORE ¶ 17.05[2].

22. If the Court finds that this action is barred by 28 U.S.C. § 1251(a) or by the Eleventh Amendment, or that interpleader jurisdiction was destroyed by termination of Alvord's status as a "claimant," it will be unnecessary to reach the issue of whether the suit should have been transferred to a neutral forum.

On that issue, Texas makes one point requiring a response. It argues that even if the heirs are added as parties, the record does not sufficiently establish that any of them resided in Colorado on July 14, 1978, the date the Complaint was filed, and hence the action cannot be transferred to a federal court sitting in Colorado. Tex. Br. 35-38. This contention is baseless. The record contains an affidavit of counsel stating that (1) in 1977 an heir executed an amendment to the inter-heir settlement in Colorado; and (2) counsel had been informed by counsel for the Estate that an heir "presently" resides in Colorado.

Texas did not object to the sufficiency of this proof in the District Court. For the first time on appeal, it asserted that (1) the heir *might* have executed the agreement in a place other than that of his residence;

(*Continued*)

DATED: December 9, 1981

Respectfully,

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and (2) the evidence based on the statement of counsel for the Estate is insufficient because it does not specify the date of residence. Although the courts below rejected California's position on the transfer to Colorado, neither did so on that ground. Rather, the briefing and argument in the District Court went to the merits of the motion. Had Texas raised that issue, any ambiguities in the affidavit of counsel could easily have been corrected; and further evidence could have been taken if necessary. Instead, the evidence submitted was undisputed. Absent contrary evidence, this showing was sufficient to establish that an heir resided in Colorado on July 14, 1978. It established that an heir was present in Colorado in 1977 and executed an important document there; this was coupled with a statement—made on August 24, 1978, only forty-one days after the relevant date—that counsel for the Estate had advised that the heir "presently" resides in Colorado. This evidence tends to show, and is sufficiently probative of, the ultimate fact—a Colorado residence of the heir on July 14, 1978. *See* F.R. EVID. 401.

Moreover, public records, which this Court can judicially notice (*see* F.R. EVID. 201), unequivocally establish the residence of the heir, John McIntosh Houstoun, both before and after the filing date. California brought these records to the attention of the Court of Appeals. *See* Request for Judicial Notice, A. 141-44. Attached to that request were copies of Colorado voting records, as well as excerpts from telephone directories for 1977, 1978 and 1979, showing Mr. Houstoun's Colorado residence when the complaint was filed. Thus if the heirs are joined, as required by Rule 19 (*see* Pet. Br. 39-45), transfer to Colorado under Section 1404(a) would be appropriate.